SUPREME COURT, U. S.

FILED

AUG 1 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 446

LEONARD GAMAGE, *Petitioner,*

v.

HAROLD BROWN, SECRETARY OF THE AIR FORCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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August 1, 1967

TABLE OF CONTENTS

Item	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute and Regulation Involved	3
Statement of the Case	3
1. *The Air Force's Investigation of the Petitioner*	3
2. *The Charges of Moral and Professional Dereliction Brought By the Air Force*	3
3. *Proceedings Before the Board*	4
4. *Further Proceedings Within the Air Force*	8
5. *The District Court's Decision*	9
6. *Reversal By the Court of Appeals*	9
Reasons for Granting the Writ	10
A. *The Statutory Guarantee of a "Fair" Hearing Was Not Afforded By the Air Force*	11
B. *There Was No Waiver*	18
C. *The Air Force Did Not Observe Its Own Regulation*	21
D. *The Court of Appeals Ignored the "Clearly Erroneous" Standard of Rule 52(a)*	23
Conclusion	26
Appendices	29
Appendix A	A1
Appendix B	A3
Appendix C	A11
Appendix D	A17
Appendix E	A19

CITATIONS

Cases:

Commissioner v. *Duberstein*, 363 U.S. 278, 289-291	11, 24, 25
Galena Oaks Corp. v. *Scofield*, 218 F.2d 217, 219 (C.A. 5, 1954)	24
Green v. *United States*, 355 U.S. 184, 191	21
Greene v. *McElroy*, 360 U.S. 474	*passim*

	Page
Hanifan v. *United States*, 354 F.2d 358, 363 (Ct. Cl., 1965)	20
In re Oliver, 333 U.S. 257	18
Lundgren v. *Freeman*, 307 F.2d 104, 113 (C.A. 9, 1962)	11, 25
Orvis v. *Higgins*, 180 F.2d 537, 539 (C.A. 2, 1950), *cert. den.*, 340 U.S. 810	11, 24
Powell v. *Zuckert*, 125 App. D.C. —, 366 F.2d 634, 640	10, 23
Service v. *Dulles*, 354 U.S. 363	21
Union Pacific R. Co. v. *American Silica Sand Co.*, 243 F.2d 309, 312 (C.A. 7, 1957)	25
United States v. *Allinger*, 275 F.2d 421, 423 (C.A. 6, 1960)	25
United States v. *General Motors*, 384 U.S. 127, 141	25
United States v. *Parke, Davis & Co.*, 362 U.S. 29, 44	25
United States v. *United States Gypsum Co.*, 333 U.S. 364, 394-395	11, 24
Vitarelli v. *Seaton*, 359 U.S. 535	*passim*
Washington v. *Texas*, 387 U.S.—18 L.Ed. 2d 1019, 1023	17
Watson v. *United States*, 355 U.S. 14	21
Widney v. *United States*, 178 F.2d 880, 884 (C.A. 10, 1949)	25
Williams v. *Zuckert*, 371 U.S. 531, rehearing granted and case remanded, 372 U.S. 765	*passim*

STATUTES AND REGULATIONS:

AFM 40-1, AF A-12.5, § 5, ¶4a	23
AFR 36-2, *et seq.*	3, 22, 23
5 C.F.R. 22.607	19
Rule 52(a) of the Federal Rules of Civil Procedure	2, 11, 24, 25
10 U.S.C. 907	4
10 U.S.C. 931	4
10 U.S.C. 933	4
10 U.S.C. 8781, *et seq.*	4, 12
10 U.S.C. 8786	12

Page

10 U.S.C. 8791, *et seq.* ..... *passim*
10 U.S.C. 8792(b) 12, 14
10 U.S.C. 8796 12
28 U.S.C. 1254(1) 2
Veterans Preference Act, 62 Stat. 354, 5 U.S.C. 652(a) 19

MISCELLANEOUS:

106 Cong. Rec. 6987 (1960) 14
1 Davis, Administrative Law Treatise (1965 Supp.), p. 171 15
5 Moore's Fed. Prac. 2642 24
House Report No. 1406, March 17, 1960, as printed in *U.S. Code Congressional and Administrative News*, 86th Cong., 2nd Sess. (1960), p. 2870. 13

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this action which became effective on May 23, 1967.

Opinions Below

The United States District Court for the District of Columbia filed a memorandum opinion (R. 137) [1] which is not reported but is printed in Appendix A hereto. The opinion of the Court of Appeals is reported at 377 F.2d — (C.A. D.C., 1967) and is printed in Appendix B hereto.

[1] Record references are to the pages of the Joint Appendix filed in the Court of Appeals and are designated in this petition as "(R. —)". Nine copies of the Joint Appendix have been filed for use by the Justices.

Jurisdiction

The Court of Appeals issued its opinion and order on March 30, 1967. A timely petition for rehearing was denied *per curiam* on May 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

This case raises three questions that merit review by this Court. They are:

1. Whether at an administrative hearing, required by statute to be "fair", an Air Force Board of Inquiry may receive into evidence, over timely objections, *ex parte* statements severely impeaching the credibility of the petitioner and bearing, in a highly incriminatory manner, upon all the charges of alleged "moral or professional dereliction" of which the Board subsequently found him guilty, thereby forcing his retirement from the active list?

2. Whether an Air Force regulation purporting to afford petitioner the "right to question any witness brought before the Board" was violated when, over objection, *ex parte* testimony of principal adverse witnesses, which was not subject to cross-examination, was used against him?

3. Whether the Court of Appeals ignored Rule 52(a) of the Federal Rules of Civil Procedure when it supplanted a district judge's finding based upon the parties' stipulation of material facts that the Board had permitted the introduction of *ex parte* written statements of principal accusing witnesses who were not made available for cross-examination by petitioner with its own finding that there "were available" to the petitioner "important additional procedures for seeking a form of cross-examination" of these witnesses, which "he knowingly failed to employ"?

Statute and Regulation Involved

The statute (10 U.S.C. 8791 *et seq.*) and the Air Force regulation (AFR 36-2 *et seq.*) involved are printed in Appendix C hereto.

Statement of the Case

1. *The Air Force's Investigation of the Petitioner.* At the time the Air Force instituted the proceedings out of which this case arose, petitioner had served in the Air Force honorably, and with distinction, for nearly 20 years (R. 24-25). On March 20, 1960, petitioner was relieved of his assignment as commanding officer of the Weather Detachment at Mather Field, California, on the basis of allegations made by subordinates in the Weather Detachment that he had caused the falsification of official documents, including weather forecasts and reports, and had failed to supervise subordinate personnel properly (R. 112). The investigation of these charges was conducted by Air Force inspectors during March 23-29, 1960 (R. 113). The inspectors interviewed only Weather Detachment personnel. They did not interview or question any of the operational personnel at Mather Field, that is, the flying units which used the weather forecasts and reports supplied to them by the Weather Detachment under petitioner's command (R. 32-33). The inspectors took sworn, *ex parte* testimony without notice to the petitioner. The Air Force inspectors instructed each *ex parte* witness not to talk about the testimony he had given, advising that it was confidential and not to be discussed (R. 60, 81, 96, 98).

2. *The Charges of Moral and Professional Dereliction Brought By the Air Force.* On January 29, 1963, nearly three years after it had begun its investigation, the Air Force instituted proceedings against the petitioner, pur-

porting to do so under authority provided by 10 U.S.C. 8791 *et seq.* These statutory provisions were enacted by the Congress in 1960.[2] They provide for the separation or involuntary retirement of officers from the active list of the Regular Air Force, on grounds of "moral or professional dereliction", or when necessary "in the interests of national security . . ." The alleged moral derelictions on which the Air Force relied in requiring that petitioner show cause why he should be retained on the active list included charges: that he had coerced subordinate personnel to fabricate official records (R. 43); that he had caused the falsification of official records, primarily weather reports (R. 44); and that he "gave false testimony" when he denied such charges during the course of the Air Force investigation (R. 45).

At the time the Air Force instituted charges of "moral or professional dereliction" against the petitioner, other statutory provisions, also enacted by the Congress in 1960 at the same time it passed the provisions now codified in 10 U.S.C. 8791 *et seq.*, authorized the Secretary of the Air Force to separate, or force the retirement of, an officer from active service if he was unable to rebut the claim that "his performance of duty has fallen below standards prescribed by the Secretary . . ." 10 U.S.C. 8781 *et seq.*[3] The charges which the Air Force brought against the petitioner also would have furnished grounds for initiation of court-martial proceedings.[4]

3. *Proceedings Before the Board.* On February 7, 1963, the petitioner acknowledged receipt of a copy of the charges and the Air Force's investigative file of some 660 pages,

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[2] 74 Stat. 393; 10 U.S.C. 8791.

[3] 74 Stat. 391; 10 U.S.C. 8781

[4] See, *e.g.*, 10 U.S.C. 907 (falsification of records); 10 U.S.C. 931 (perjury); and 10 U.S.C. 933 (conduct unbecoming an officer and gentleman).

containing approximately 285 separate documents, among which were copies of the sworn statements taken secretly by the Air Force from several adverse witnesses in March of 1960 (R. 33, 115). In early April of 1963, the petitioner was given the names and addresses of potential witnesses, including the names and addresses of five *ex parte* witnesses, who had already given secret, sworn testimony against him (R. 116). On June 13, 1963, and again on August 1, 1963, prior to the hearing before the Board of Inquiry, petitioner's trial counsel wrote to request that the Recorder of the Board obtain the presence of a number of witnesses, including four of the adverse *ex parte* witnesses. In his letters, counsel stated that he wished the adverse witnesses to appear at the Board hearing and that he regarded *ex parte* affidavits or statements as inadmissible unless the persons who gave them were made available for cross-examination at the hearing or through examination on deposition (R. 118). By this time, 1963, the four adverse *ex parte* witnesses whose presence at the hearing had been requested by petitioner were no longer in the Air Force. One resided in Texas, another in Wisconsin, and two, one of whom was a retired officer, lived in California. The fifth adverse witness was an Air Force major, then on active duty in England (R. 116).

Beginning on August 8, 1963, the Recorder for the Board of Inquiry sent telegrams, letters, or both, to the five adverse *ex parte* witnesses, requesting, in the name of the President of the Board of Inquiry, that they appear and testify at the hearing. All declined, the last refusal through a letter which reached the Recorder on or about August 17, 1963, two days before the hearing began (R. 120). There was no compulsory process by which, in 1963, either the Air Force or the petitioner could have compelled or elicited testimony under oath, either by way of affidavit, deposition

or other pre-hearing procedures, from witnesses who had declined the Board of Inquiry's invitation to attend the hearing in person.

At the hearing petitioner's trial counsel made timely, but unsuccessful, objections to the admission into evidence before the Board of the sworn deposition testimony and affidavits of five adverse *ex parte* witnesses (R. 119-120). Petitioner was found innocent of fourteen of the original charges against him (R. 126). However, he was found guilty of four categories of charges, i.e., (1) that he caused or directed the falsification of official records; (2) that he coerced one of the *ex parte* witnesses to file a false record; (3) that he threatened military personnel; and (4) that he gave false testimony when he denied these charges during the investigation. (R. 42-45, 47).

The principal evidence against petitioner was supplied by the *ex parte* witnesses. The evidence respecting the alleged falsification of records, for example, was primarily that of petitioner's *ex parte* accusers. They testified, *ex parte*, that they had falsified official records but that petitioner had told them to do so (which petitioner denied). For example, Sgt. Minga testified, *ex parte*:

> "Yes, sir. (Going over forms and laying aside). These are the fabricated ones, sir.
>
> "(Note: Four fabricated forms and the four original forms are also here)
>
> "By whom were you told to do this?
> "By Col. Gamage and Capt. Boyce. Capt. Boyce and I were told to do this.
> "Directly by Col. Gamage?
> "Yes, sir." (R. 56)

Capt. Boyce testified, *ex parte*, to the same effect (R. 71-77, 78). It was admitted falsifiers of the official records in question who testified, *ex parte*, over objection, against petitioner.

The *ex parte* statements to which petitioner's counsel had objected unsuccessfully were part of the evidence on which the Board of Inquiry relied in finding the petitioner guilty of several charges of falsifying Government records and denying under oath that he had done so and on the basis of which findings the Secretary of the Air Force thereafter removed the petitioner from the active list (R. 132).[5] The *ex parte* evidence bore on all the charges of which the petitioner was found guilty.[6] Portions of the testimony of the adverse *ex parte* witnesses also impeached petitioner's credibility, charging, *inter alia*, that: he was "a lazy, pathological liar"; who committed "outright lies in almost every phase of his duties"; and who "lies all of the time . . ." (R. 65, 80, 83). None of these statements, nor any of the testimony supplied by the five absent *ex parte* witnesses, was subject to cross-examination at any time by petitioner's counsel. The statements quoted above were given by subordinate personnel, who testified that they fabricated records at the request of the petitioner (R. 56, 71). One of them, Capt. Boyce, a retired officer, admitted that he falsified records in a manner which he hoped would incriminate the petitioner (R. 71). This same *ex parte* witness also accused petitioner of attempting to create a "very favorable impression on using agencies [i.e., the pilots who used the weather

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[5] Petitioner's active duty pay with allowances was $1,085 a month; his retired pay is $486.75 per month (R. 128).

[6] Illustrative of the challenged *ex parte* testimony are the statements printed in Appendix D hereto. All of this *ex parte* testimony is set out in the record (R. 51-104).

information] . . .", but of having no "interest in the welfare of his [Weather] personnel" (R. 80).

In contrast to the testimony supplied by his *ex parte* accusers the operating (flying) personnel who testified at the Board hearing gave very favorable testimony in petitioner's behalf, complimenting the quality of the weather service information which they had been furnished by the petitioner, as commanding officer of the Weather Detachment (R. 25-26, 29). The fliers also testified that they could discern no useful purpose for the petitioner to have caused the fabrication of weather reports. In the first place, in the judgment of the flying units which used them, his weather reports were highly accurate (R. 27). Secondly, a number of copies were made of each weather report prepared under petitioner's direction, and were simultaneously distributed to a number of bases and operating units (R. 35-37). The originals of his reports were forwarded, at the time of their preparation, to other bases, including higher commands (R. 37). These originals, however, were not produced by the Air Force at the Board of Inquiry hearing. Nor were they produced on review by the Secretary of the Air Force of the Board's decision, despite a request for their production by petitioner's counsel.

4. *Further Proceedings Within the Air Force.* The Board recommended that the petitioner be removed from the active list. On appeal, an Air Force Review Board upheld that decision. During the course of the appellate proceedings within the Air Force, California counsel for the petitioner submitted an affidavit of Dr. Paul Kirk, a nationally known handwriting expert (R. 105-110). Dr. Kirk, after examining some of the documents which the Air Force alleged the petitioner had made up or fabricated, concluded that the signature of the author of those documents was not that of the petitioner. Dr. Kirk's opinion was that they "were

written by a person other than Lt. Col. Gamage" and that "inescapably . . . these letters are forged." (R. 110).

The respondent's predecessor, after denying petitioner's petition for reconsideration, directed his involuntary retirement effective on April 30, 1964.

5. *The District Court's Decision.* In the District Court, the Air Force contended that no stigma attached to the petitioner under the circumstances of his involuntary retirement following the proceedings described in prior sections of this petition. The trial judge disagreed. He found that this was not "a case of a minor infraction," but "involves a very serious charge, namely, falsification of records." (R. 138). He observed that the "fact that there was other evidence in the case which was sufficient to sustain the charges does not change the result," since we "do not know but that the statements in question might have swung the result." The district judge expressed his opinion that "it was an error that went to the very roots of a fair hearing to introduce *ex parte* statements of witnesses which constitute part of the evidence against the plaintiff," who had been charged with "a serious dereliction . . ." (R. 138). He then granted petitioner's motion for summary judgment and denied respondent's cross motion (R. 139).

6. *Reversal By the Court of Appeals.* The Court of Appeals held, without specifying what they were, that "important additional procedures for seeking a form of cross-examination of all five persons whose statements are the subject of this dispute were available to [petitioner]."[7] Finding that the petitioner "knowingly failed to employ" these unspecified "procedural rights . . .", the Court of Appeals reversed the District Court and remanded the case for dismissal of the complaint.[8]

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[7] Appendix B, p. A10.

[8] *Ibid.*

Reasons for Granting the Writ

In reversing the District Judge's decision that an Air Force Board of Inquiry had improperly permitted, over timely objection, the use of highly prejudicial *ex parte* testimony by principal accusers leading to the involuntary retirement of the petitioner on grounds of moral and professional dereliction, i.e., the falsification of Government records and perjury, the Court of Appeals acknowledged that the facts raised "the classic case of failure of opportunity for confrontation . . ." and that the "issues involved in this case are substantial ones". In this Court, petitioner presses four claims. Any one or all of them, we believe, justify the issuance of the writ.

First, the decision of the Court of Appeals is in conflict with the controlling decision of this Court on the right of confrontation and cross-examination possessed by employees who either are forced out of Government service or denied entry to it on grounds which fasten a moral stigma upon them. *Greene* v. *McElroy*, 360 U.S. 474. Secondly, the Court of Appeals, in apparently grounding its decision on a requirement that the petitioner should have performed a patently futile act, i.e., formally requesting the pre-hearing depositions or affidavits of concededly adverse *ex parte* witnesses who had refused to come to the hearing at the invitation of the Air Force, and whose attendance, either on deposition or at the hearing, could not have been obtained by compulsory process or through any other available pre-hearing procedure, departed from the Court's ruling in *Williams* v. *Zuckert*, 372 U.S. 765. Thirdly, the Court of Appeals put aside the lesson of this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535, as well as its own holding in *Powell* v. *Zuckert*, 125 App. D.C. —, 366 F.2d 634, 640, when it failed to construe an Air Force

regulation which guaranteed petitioner the right "to question any witness brought before the board of inquiry", to permit him to cross-examine accusing *ex parte* witnesses whose prejudicial *in camera* testimony was introduced in evidence and relied on by the Board in reaching its adverse decision.

Finally, in addition to its several departures from controlling precedents of this Court in the field of federal administrative law and procedure, the Court of Appeals indulged in a particularly inexplicable failure to observe the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure. Wholly without support in the record, it has supplanted a contrary finding of the trial court, based on a stipulation of material facts agreed upon by the Government and the petitioner, with its own finding that there were "important additional procedures for seeking a form of cross-examination" of the adverse *ex parte* witnesses and that the petitioner "knowingly failed to employ" these allegedly available, but unidentified, procedures. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394; *Commissioner* v. *Duberstein*, 363 U.S. 278, 289-291. This procedural lapse by the Court of Appeals presents an opportunity for this Court to resolve a conflict among the Circuit Courts of Appeal as to whether the precept of Rule 52(a) may be totally disregarded in cases where a trial court's finding or inference rests upon or is drawn from stipulated or undisputed facts.[9] Compare, *e.g.*, *Lundgren* v. *Freeman*, 307 F.2d 104, 113 (C.A. 9, 1962) with *Orvis* v. *Higgins*, 180 F.2d 537, 539 (C.A. 2, 1950).

In more detail, petitioner's reasons are:

A. *The Statutory Guarantee of a "Fair" Hearing Was Not Afforded by the Air Force.* In 1960 Congress enacted

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[9] Petitioner raised this last issue in his petition for rehearing *en banc*, which the Court of Appeals denied.

the provisions now found in 10 U.S.C. 8791 *et seq.* These provide that:

> "The Secretary of the Air Force may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Air Force to determine whether he shall be required, *because of moral dereliction, professional dereliction,* or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list."[10]

The statute also requires, in 10 U.S.C. 8792(b), that a "fair and impartial hearing before a board of inquiry shall be given" each officer who is required to show cause for his retention on the active list. An officer removed under these statutory provisions may be "discharged" with severance pay, except if on the date of his removal he is eligible, as was the petitioner, for voluntary retirement, in which case he is involuntarily retired in the grade and with the pay to which he would have been entitled had he retired at his own request. 10 U.S.C. 8796(b).

Although the Court of Appeals passes over it in noncommittal silence, there is significant legislative history surrounding both the enactment of the "moral or professional dereliction" removal provisions and the enactment of the provisions now found in 10 U.S.C. 8781 *et seq.* These latter provisions permit a Secretary of one of the military departments to remove an officer from the active list where his "performance of duty has fallen below the standards prescribed by the Secretary, . . ." Removal under these particular provisions, unlike removal pursuant to 10 U.S.C. 8796, requires that the officer be either voluntarily retired or *honorably* discharged with severance benefits. 10 U.S.C.

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[10] Italics supplied throughout the petition.

8786. The combined legislative history of these two different statutory removal procedures[11] indicates that Congress regarded a removal for "moral or professional dereliction", pursuant to the procedures prescribed in 10 U.S.C. 8791, as one which placed a stigma on the officer so removed. Indeed, Air Force witnesses who testified before Congress in support of the legislation indicated that an earlier show-cause procedure had not been used to eliminate the "sub-standard officer", but was only resorted to in the case of "the man [who] had done something wrong".[12] The House committee report also took cognizance of the taint which attaches to a military officer removed on the grounds of "moral or professional dereliction".[13]

In the House, Congressman Bennett of Florida, a member of the subcommittee which considered the legislation, and the last member of the House to speak in the debate, rose to "emphasize the safeguards we included in the bill . . .", i.e., the show-cause procedure under 10 U.S.C. 8791 *et seq.*, explaining:

> "Each officer being considered for removal under the permanent part of this law [10 U.S.C. 8791, *et seq.*] is guaranteed the opportunity of a 'full and fair hearing' and a review by a subsequent and disinterested board, with final approval authority vested in the Secretary . . . *the right of confrontation and access to all evidence is guaranteed in every case except in those few instances where an officer is being considered for removal because his continued retention would en-*

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[11] Printed as Appendix E hereto are extracts from the legislative history of 10 U.S.C. 8781 *et seq.* and 10 U.S.C. 8791 *et seq.*

[12] Appendix E, pp. A19-A21.

[13] House Report No. 1406, March 17, 1960, as printed in *U.S. Code Congressional and Administrative News*, 86th Cong., 2nd Sess. (1960), p. 2870; see also Appendix E, pp. A25-A26.

danger national security. In those cases, it is specifically required that the officer be furnished a summary of any information or evidence which is withheld from him.[14]

Petitioner reads the text of the statute and its legislative history to support the following conclusions: (1) that Congress was aware that a stigma attached to an officer discharged or involuntarily retired on grounds of "moral or professional dereliction"; (2) that it intended to give the Secretaries of the three military departments a freer hand when removing the honest but inefficient officer from the active list, by permitting them to remove such officer when the performance of his duty fell below prescribed standards, without thereby subjecting him to the moral stigma or taint which attached to removal for wrongdoing under 10 U.S.C. 8791; and (3) that the "fair" hearing which Congress provided in 10 U.S.C. 8792(b) guaranteed "the right of confrontation in any case", except where an officer was being removed as an alleged security risk, in which case he would be entitled only to a summary of any evidence withheld from him.

Despite the fairly implied, if not explicit, procedural protections afforded under 10 U.S.C. 8791 *et seq.*, the Court of Appeals has sanctioned the petitioner's involuntary removal from the active list of the Air Force, after 20 years of honorable service, with the brand of forger and perjurer placed on him. Petitioner has never contended that he has any constitutional right to remain on active duty. He argues only that before he was removed for alleged "moral or professional dereliction" he had a right to the "fair" hearing which Congress first provided military officers in 1960, when it enacted 10 U.S.C. 8791 *et seq.* It is this statutory

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[14] 106 Cong. Rec. 6987 (1960).

right which the Board of Inquiry did not afford, an omission which, in the language of the trial judge, "was an error that went to the very roots of a fair hearing . . ." (R. 138).

This Court's landmark decision in *Greene* v. *McElroy*, 360 U.S. 474, is the "case which overshadows all previous case law on the right of federal employees to full hearing" on questions of discharge or removal.[15] Involved was the revocation of security clearance for access to confidential information granted to the employee of a private company which produced goods for the military services. During administrative appeals in which he protested this denial of access, the plaintiff was not permitted to confront and cross-examine confidential informants of the Government, whose *ex parte* statements were used against him. In upholding Greene's contention that this was unlawful, this Court decided in his favor, not on the basis of due process requirements, but on the ground that the statute and executive order under which security proceedings were conducted had not made explicit the intention to deny the right of confrontation and cross-examination. Specifically, said the Court:

> "In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered *after a hearing which failed to comport with our traditional ideas of fair procedure.* The type of hearing was the product of administration decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution, we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the

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[15] 1 Davis, Administrative Law Treatise (1965 Supp.), p. 171.

limits on executive or legislative authority may be. *We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross examination.*[16]

Greene v. *McElroy, supra,* should be dispositive of this case. If necessary, it could be argued that this petitioner's contentions present an *a fortiori* situation. In *Greene* v. *McElroy,* the Government was at least able to argue that important considerations of national security justified denial of the fundamental right of confrontation and cross-examination. Moreover, in the present case, the statute under consideration explicitly provides for a "fair and impartial hearing"; and its legislative history also indicates that the statutory language was intended to *assure* the right of confrontation and cross-examination, except when removal is based on security considerations. In contrast, this Court pointed out in *Greene* v. *McElroy, supra,* that neither the Congress nor the President had made "explicit" the intention to *withhold* this fundamental right.[17]

The Court of Appeals, however, attempted to avoid the force of *Greene* v. *McElroy* by assuming that the petitioner "had procedural rights (which were never accorded in the *Greene* case!) which he knowingly failed to employ."[18] There are two basic errors in this "finding" by the Court of Appeals. First, it has no support in the record. Secondly, it is fatally vague. It does not specify any alleged procedural right which the petitioner failed to pursue. We

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[16] 360 U.S., at 508.

[17] 360 U.S., at 508.

[18] Appendix B, p. A9.

believe it unfortunate that the fundamental right of cross-examination should ever be denied in the absence of the clearest waiver of that right. To approve of its denial on the basis of an attenuated finding of the type made by the Court of Appeals is to invite, in future cases, serious erosion of a right which, in our jurisprudence, is considered the indispensable support of the adversarial method for getting at the truth, whether in the judicial or in the administrative process.

The stipulated record shows, too plainly for argument, that there was no subpoena power, compulsory process or other pre-hearing procedure by which the petitioner could have obtained, either on deposition or by affidavit, the sworn testimony of his principal accusers who, three years before, had given *ex parte* testimony, not only bearing directly on all the charges of which he was later found guilty, but severely impeaching his credibility as well. The major premise, therefore, on which the Court of Appeals attempted to distinguish this case from *Greene* v. *McElroy, supra,* is purely an *ipse dixit* proposition. It is not only without support in the stipulated record, but, on the contrary, is directly contradicted by the undisputed facts, as the Government itself must concede and, indeed, did concede during argument in the courts below.

In putting *Greene* v. *McElroy* aside, the Court of Appeals noted that it did not "deal here with a criminal trial". That is true. Nevertheless, in *Greene* v. *McElroy,* and in recent subsequent reaffirmations of that decision, this Court has indicated the compelling importance which it attaches, and the wide reach it gives, to the "traditional . . . safeguards of confrontation and cross-examination". For example, in the closing days of the last Term, in *Washington* v. *Texas,* 387 U.S. —, 18 Law Ed.2d 1019, 1023, the Court stated:

"This Court had occasion *In re Oliver*, 333 U.S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948) to describe what it regarded as *the most basic ingredients of due process of law.* It observed that:

> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, *a right to cross examine the witnesses against him, to offer testimony,* and to be represented by counsel.'"

We draw, with some confidence, the conclusion that the right to cross-examine accusing witnesses is one of "the most basic ingredients of due process of law". The same ingredient would, therefore, appear to be an indispensable prerequisite in an adversarial hearing which Congress has required to be "fair". The omission of that indispensable ingredient by the Board of Inquiry and the Court of Appeals' sanctioning of its omission substitute form for the substance of the Congressional command and give this Court's ruling in *Greene* v. *McElroy* a severely restricted application for which we can find no justification, either in the result reached there or in the broad and moving rationale which the Court articulated in preserving the fundamental right of cross-examination in that case.

B. *There Was No Waiver.* The Court of Appeals proceeds from its major misassumption that the petitioner had available to him procedural means through which to compel sworn, pre-hearing testimony on the part of hostile, *ex parte* witnesses to reach a second, and equally erroneous, conclusion. It holds that the petitioner waived his right to utilize "important additional procedures for seeking a form of cross-examination" of these *ex parte* witnesses.[19]

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[19] Appendix B, p. A10.

Here, it cites as authority this Court's decision in *Williams* v. *Zuckert*, 372 U.S. 765. Petitioner might concede that if there had been "available" some means by which he could have compelled the sworn, pre-hearing testimony of principal accusers who already had given damning *ex parte* statements against him, and he had failed to pursue them, then *Williams* v. *Zuckert*, *supra*, would be controlling and the Court of Appeals' syllogistic reasoning unassailable. That is not this case, however.

In *Williams* v. *Zuckert*, the Circuit Court of Appeals for the District of Columbia had upheld the District Court's grant of summary judgment against a contention that a Civil Service employee's procedural rights had been denied by the failure to produce at a hearing under the Veterans Preference Act three members of the Air Force whose affidavits furnished the basis of the original charges brought against him. 111 App. D.C. 294, 296 F.2d 416. The hearing afforded in that case was not required by the Veterans Preference Act, 62 Stat. 354, 5 U.S.C. 652(a), but was provided for under a rule of the Civil Service Commission. The rule required the employee to make his "own arrangements for the appearance of witnesses". 5 C.F.R. 22.607. After granting certiorari, this Court found that the employee's request for the production of witnesses, which was made for the first time at the hearing, "was neither timely nor in conformity with the applicable regulations which contemplate that the party desiring the presence of witnesses, either for direct examination or cross-examination, shall assume the initial burden of producing them." 371 U.S. 531, 532. Williams had not objected to the use of the *ex parte* statements; his objections went only to the denial of cross-examination. Upon rehearing, however, this Court vacated the judgment of the Court of Appeals and remanded the case to the District Court, with instructions to hold a hearing in order to determine whether the employee had

complied with "the applicable regulations by making timely and sufficient attempt to obtain their presence, or, *under the circumstances* and without fault of his own, was justified in failing to make such an attempt, and, if so, whether proper and timely demand was made upon the Air Force, so that it was required to produce such witnesses for cross-examination." 372 U.S. 765.

In this case, petitioner made several timely requests in writing that the absent accusing witnesses be produced, protesting that, unless produced, their *ex parte* testimony should not be admitted in evidence (R. 118). In short, far from waiving any right to examine hostile, *ex parte* witnesses, petitioner consistently insisted that he be permitted to exercise such right! The Government conceded in the Court of Appeals that so far as the absent *ex parte* witnesses were concerned "nothing could be done about their refusal to attend." Neither the Air Force nor the petitioner could either compel these witnesses to attend the hearing, or, by 1963, when the petitioner was served with charges, to submit themselves for examination on deposition, or to provide some other form of sworn pre-hearing testimony. The record also reveals that the last of the replies from the *ex parte* witnesses refusing the Air Force's invitations to attend the hearing before the Board of Inquiry did not reach the Recorder of the Board until just two days before that hearing was scheduled to begin (R. 120). The *ex parte* witnesses at this time were scattered throughout the country (R. 116).

Williams v. *Zuckert*, *supra*, petitioner believes, reaffirms the traditional reluctance of the law to require the performance of a futile act as a condition precedent to the exercise of important procedural rights.[20] In the language of this

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[20] See, *e.g.*, the recent decision of the Court of Claims in *Hosifan* v. *United States*, 354 F.2d 358 (Ct. Cl., 1965), holding that a civil service employee need not personally invite the attendance of adversarial witnesses

Court's opinion in that case, the instant petitioner, "under the circumstances . . . was justified in failing" to pursue procedures which did not exist in order to compel testimony from *ex parte* witnesses, consisting of principal accusers, whose sworn testimony the Air Force had taken *in camera* some three years before the hearing began. And surely it is highly improbable that persons who previously had given unabashedly accusatory statements to the Air Force under oath would voluntarily submit to cross-examination under oath at the invitation of counsel for the man whom they already had accused in their sworn testimony. In light of the undisputed facts, and in view of this Court's opinion in *Williams* v. *Zuckert, supra,* petitioner is baffled by the Court of Appeals' finding that the petitioner somehow waived his right to object to highly prejudicial, *ex parte* testimony. For waiver to exist, there first must be present a right to waive. *Green* v. *United States,* 355 U.S. 184, 191. A search of this record yields not the shred of a suggestion that petitioner waived any meaningful right, otherwise available to him, to secure the sworn testimony of his principal accusers prior to the hearing at which their prior *ex parte* testimony was introduced over his objections.

C. *The Air Force Did Not Observe Its Own Regulation.* When a Government agency, including a military department, prescribes a procedural regulation, it binds the agency along with others, even where administrative action made subject to the regulation was otherwise purely discretionary in nature. *Vitarelli* v. *Seaton,* 359 U.S. 535; *Watson* v. *United States,* 355 U.S. 14; and *Service* v. *Dulles,* 354 U.S. 363. The Court of Appeals concluded that the Air Force's regulations "appear to have been followed ex-

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whom he had reasonable belief to conclude would be "unresponsive" to his invitation. There, as in the instant case, such invitation "would be simply an exercise in futility." 354 F.2d, at 363.

plicitly by the Board of Inquiry".[21] That is true, with one major, all encompassing, exception, i.e., the actual regulation at issue in the courts below, of which the Court of Appeals makes no mention in the body of its opinion. We refer to AFR 36-2, §17d which, in enumerating the procedural rights to be afforded an officer appearing before a Board of Inquiry, provides that:

> "He or his counsel may question any witness brought before the board of inquiry."

This regulation, reasonably read, would appear to imply the right to cross-examine any witness whose sworn testimony is submitted to the Board, whether at the hearing, by deposition or by affidavit. Controlling here should be *Vitarelli* v. *Seaton, supra.* There, a regulation of the Department of the Interior gave an employee, against whom security charges were brought, the "right to cross-examine any witness offered in support of the charges". A non-confidential informant gave *ex parte* information detrimental to the employee. This Court set the Secretary's removal order aside on the ground, *inter alia,* that the employee had been denied the right to cross-examine the adverse, *ex parte* witness in violation of the Department of Interior's own rule. The Court construed that rule to imply that employees had the right to cross-examine non-confidential informants "who provide material taken into consideration by the board." 359 U.S., at 534-535. In this case, it is stipulated that the damaging testimony of accusing *ex parte* witnesses was introduced in evidence before the Board of Inquiry and relied on by the Board in reaching its decision against the petitioner. The President of the Board stated, in overruling petitioner's objections to the use of the *ex parte* testimony, that its members "are entitled to every

[21] Appendix B, p. A7.

shred of evidence or information to properly consider the case of the [petitioner]" (R. 121).

The Court of Appeals never faced up to the issue of the proper construction of AFR 36-2, §17d. This may explain why it also made no reference to its earlier decision in *Powell* v. *Zuckert*, 125 App. D.C. —, 366 F.2d 634. In that case, another panel of the same court was called upon to construe a regulation of the Air Force which provided, in civilian employee discharge proceedings, that the employee had "the right to question any person . . . who testifies at the hearing . . ." AFM 40-1, AF A-12.5, §5, ¶4a. The panel there, following *Vitarelli* v. *Seaton*, *supra*, held that a civilian employee of the Air Force discharged partially on the basis of evidence presented in the form of an affidavit of an adverse witness who did not testify at the hearing had been discharged in violation of the Air Force regulation referred to immediately above. The regulation involved in *Powell* v. *Zuckert*, while not *in haec verba* with AFR 36-2, §17d, is substantially identical. If anything, it might be argued that language which permits an accused to "question any witness brought before the board of inquiry" implies a slightly broader right of cross-examination of *ex parte* witnesses than a regulation which guarantees merely "the right to question any person . . . who testifies at the hearing." Perhaps if the Court of Appeals had focused on its prior decision in *Powell* v. *Zuckert*, it might have realized how wide of the mark it was in stating that the Air Force regulations "appear to have been followed explicitly by the Board of Inquiry." Therefore, unless the Court's holding in *Vitarelli* v. *Seaton*, *supra*, was intended only to apply to civilian employees, this third independent ground also justifies the grant of certiorari in this case.

D. *The Court of Appeals Ignored the "Clearly Erroneous" Standard of Rule 52(a).* Petitioner previously

has argued the critical mistake made by the Court of Appeals in substituting for the district judge's finding that *ex parte* accusing witnesses were not made available to plaintiff for cross-examination "either by way of depositions or during the hearing", its own, but unsupportable, finding that important "additional procedures for seeking a form of cross-examination of all" the *ex parte* witnesses were available to petitioner.[22] Not only does this error go to the heart of the case, it also represents a disturbing deviation from requirements imposed by Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) provides that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Petitioner concedes that where, as here, a case is heard on a stipulated record, with no testimony of live witnesses to evaluate, the burden which a reversing appellate court has of showing the "clearly erroneous" nature of the lower court's findings is lighter. *Galena Oaks Corp.* v. *Scofield*, 218 F.2d 217, 219 (C.A. 5, 1954). However, decisions of this Court indicate that the burden still remains in such cases, although reduced in rigidity, and also applies in reviewing "factual inferences [drawn] from undisputed basic facts". *Commissioner* v. *Duberstein*, 363 U.S. 278, 291; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395. Yet, a line of cases in several of the Courts of Appeal, apparently taking the late Judge Frank's decision in *Orvis* v. *Higgins*, 180 F.2d 537 (C.A. 2, 1950), *cert. den.*, 340 U.S. 810, and the approving comments of Professor Moore as their guide,[23] holds that where review is on a stipulated record, or involves

[22] Appendix B, p. A10.

[23] 5 Moore's Fed. Prac. 2842.

only the drawing of inferences from undisputed facts, the "clearly erroneous" rule is not applicable. *United States* v. *Kavanagh*, 308 F.2d 824, 828 (C.A. 8, 1962); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F.2d 381, 388 (C.A. 8, 1960); and *United States* v. *United States Steelworkers of America*, 271 F.2d 676, 685 (C.A. 3, 1959), *affirmed*, 361 U.S. 39. The Ninth, Tenth, Sixth and Seventh Circuits, on the other hand, adhere to the position that the "clearly erroneous" test of Rule 52(a) still applies in cases where the facts are not in dispute and where review is primarily concerned with the inferences drawn from such facts by the trial court. *Lundgren* v. *Freeman*, 307 F.2d 104, 113 (C.A. 9, 1962); *Widney* v. *United States*, 178 F.2d 880, 884 (C.A. 10, 1949); *United States* v. *Allinger*, 275 F.2d 421, 423 (C.A. 6, 1960); and *Union Pacific R. Co.* v. *American Silica Sand Co.*, 243 F.2d 309, 312 (C.A. 7, 1957).

On the merits, petitioner would urge that the Court approve the view of the Tenth Circuit, as recently expressed in *Lundgren* v. *Freeman*, *supra*, namely, that the Judge Frank-Professor Moore interpretation of the inapplicability of Rule 52(a) is disproven by both the purpose of the rule and its subsequent decisional applications, including this Court's holding in *Commissioner* v. *Duberstein*, *supra*, 307 F.2d, at 113. Accordingly, whether the Court of Appeals supplanted a finding of fact by the District Court or merely substituted one inference for another, it was error for it to have done so.[24] The trial court's critical finding (or inference) was not "clearly erroneous". Rather, the Court of Appeals' substitute finding is oblivious to stipulated and indisputable facts, i.e., that there was no compulsory process

[24] There is not presented here any question of whether a trial court "applied the proper [legal] standard to essentially undisputed facts." *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *General Motors*, 384 U.S. 127, 141.

or other pre-trial procedures available through which the petitioner might have obtained sworn testimony under oath, either on depositions or in affidavits, from accusing *ex parte* witnesses who had given sworn testimony to the Air Force three years before when they were in military service.

Conclusion

In *Greene* v. *McElroy*, 360 U.S. 474, 497 this Court quoted with approval Professor Wigmore's famous statement:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross examination as a vital feature of the law."

This Court stated:

> "This Court has been zealous to protect those rights from erosion. It has spoken out not only in criminal cases (citing) but also in all types of cases where administrative or regulatory actions were under scrutiny. (Citing)"

The Air Force's denial of petitioner's right to confrontation and cross-examination which occurred here is no isolated injustice. The Board of Inquiry which permitted the introduction into evidence, over timely objection of the raw investigative file containing the *ex parte* accusations involved in this case was acting in precise accord with a confidential Air Force guidance manual (R. 120). It can be anticipated, therefore, that unless this Court acts, the Air Force guidance manual, and not the statutory guarantee of a "fair" hearing, will continue as the authority under which other officers will be drummed out of the active service because of alleged "moral or professional dereliction", with-

out the opportunity to confront and cross-examine their accusers.

For the reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

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August 1, 1967